

1
2
3
4
5
6
7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
9

10 EDUARDO ARTIAGA, *et al.*,

11 Plaintiffs,

12 v.

13 HUTCHINS DRYWALL, INC., *et al.*,

14 Defendants.
15
16

Case No. 2:06-CV-01177-KJD-LRL

ORDER

17 Presently before the Court is Defendant Pulte Home's Motion to Dismiss (#30). Plaintiff
18 filed a Response in opposition (#32) to which Defendant filed a Reply (#43).

19 **I. FACTUAL BACKGROUND**

20 Plaintiffs Eduardo Artiaga, Miguel Flores, Francisco Flores, Tomas Nava and Jorge Murgia
21 ("Plaintiffs") filed their original Complaint on September 21, 2006, in which they alleged violations
22 of the Fair Labor Standards Act as well as violations of N.R.S. 608.115. (Pls.' Compl. 10-12.) The
23 Complaint names subcontractors Hutchins Drywall, Inc., Mark Hutchins, and Centennial Drywall
24 Systems, Inc. as defendants ("Employer Defendants"). *Id.* The Complaint also names original
25 contractor Pulte Home as a defendant, pursuant to N.R.S. 608.150, because Employer Defendants
26 were allegedly subcontractors to Pulte Home and Plaintiffs performed work on Pulte Home projects

1 as directed by Employer Defendants. Id. at 13,14. Plaintiffs worked for Employer Defendants for
2 more than four years as drywall workers. Id. at 6.

3 Plaintiffs allege that Employer Defendants required Plaintiffs to work more than forty hours
4 in a workweek with no additional compensation for those hours in excess of forty hours as required
5 by the Fair Labor Standards Act, 29 U.S.C. §§ 206 and 207. (Pls.' Compl. 11.) Plaintiffs further
6 allege that Employer Defendants misrepresented to Plaintiffs that they were independent contractors,
7 and therefore that Plaintiffs were not eligible for overtime compensation under the law. Id. at 7.
8 Plaintiffs have not claimed a specific amount of unpaid wages that are owed, but claim this is due to
9 Employer Defendants' lack of maintaining records of Plaintiffs' hours worked. Id. at 11. Plaintiffs
10 further allege that they worked overtime, which was not compensated, on projects that Employer
11 Defendants had subcontracted from Pulte Home. Id. at 14.

12 Here, Pulte Home contends that they cannot be properly included as a party to the litigation
13 under N.R.S. 608.150 for two main reasons: (1) because a court must find the subcontractor owes
14 unpaid wages, unpaid benefits, or damages prior to the involvement of an original contractor, and
15 Plaintiffs have not done so; and (2) because Plaintiffs must exhaust all possibilities of recovery from
16 the subcontractors before they may collect from the general contractor under N.R.S. 608.150, and
17 Plaintiffs have not done so. (Def. Mot. Dismiss 4.) In opposition, Plaintiffs contend it is proper for
18 Pulte Home to be included in the litigation because it is not necessary to obtain a court finding of
19 unpaid wages, unpaid benefits, or damages prior to the involvement of a general contractor. (Pls.
20 Resp. 2.) Plaintiffs further contend that they are not required to exhaust all possibilities of recovery
21 from the subcontractor before the general contractor may be held liable under N.R.S. 608.150. Id. at
22 7.

23 **II. STANDARD & ANALYSIS**

24 The Court finds it is not premature or improper for Pulte Home, the original contractor, to be
25 joined in the present suit, and that Plaintiffs may sue the subcontractors and the original contractor
26 concurrently. The Court further finds that Plaintiffs do not need to obtain a final court judgment

1 against the subcontractors in order to proceed against the original contractor. Also, Plaintiffs do not
 2 need to show that the subcontractors are unable to pay in order to proceed against the original
 3 contractor.

4 Pulte Home argues that N.R.S. 608.150 essentially creates two conditions that must be met
 5 before the original contractor may be held liable. They are: (1) that a plaintiff must obtain a court
 6 finding of subcontractor liability, and (2) that the subcontractor be unable to pay or satisfy the
 7 judgment. Pulte wishes this Court to believe that Plaintiffs are unable to sue both subcontractors and
 8 general contractors jointly. The Court does not agree.

9 The plain language of N.R.S. 608.150 states, “[e]very original contractor . . . shall assume
 10 and be held liable for the indebtedness for labor incurred by any subcontractor or any contractor
 11 acting under, by or for the original contractor in performing any labor, construction or other work
 12 included in the subject matter of the original contract . . .” N.R.S. 608.150(1). The statute further
 13 states that the district attorney can “institute civil proceedings against any such original contractor
 14 failing to comply with the provisions of this section in a civil action for the amount of *all wages and*
 15 *damage that may be owing or have accrued as a result of the failure of any subcontractor acting*
 16 *under the original contractor . . .*” N.R.S. 608.150(3) (emphasis added). This has been expanded by
 17 the Supreme Court of Nevada in U.S. Design to give all employees a private right of action directly
 18 against the original contractor. U.S. Design & Constr. v. I.B.E.W. Local 357, 50 P.3d 170, 172 (Nev.
 19 2002).

20 Nevada Courts have upheld the right of employees of a subcontractor to sue the original
 21 contractor for unpaid wages, and that original contractors may be liable to the same extent as the
 22 subcontractor. They have further held that employees may sue a subcontractor and original
 23 contractor jointly, before the liability of the subcontractor has been established by a court judgment.

24 In Trustees v. Summit, the United States District Court for the District of Nevada held that
 25 subcontractors and their original contractors could be sued concurrently. Trustees of Const. Industry
 26 and Laborers Health and Welfare Trust v. Summit Landscape Co., 309 F.Supp.2d 1228 (D. Nev.

1 2004). In Summit, Lake Mead Constructors was a general contractor for landscape work on the
2 Southern Nevada Water Authority's River Mountain Project, and Summit was its subcontractor. Id.
3 at 1232. In Summit, both the general contractor and the subcontractors were sued simultaneously
4 *before* the liability of the subcontractor had been established. Summit, 309 F.Supp.2d 1228. The
5 court in Summit held that Summit was liable for \$289,682.93 in unpaid contributions, \$53,860.11 in
6 interest on the unpaid contributions, \$53,860.11 in liquidated damages, and reasonable attorney's
7 fees. Id. at 1245. The court further held that Lake Mead Constructors, the original contractor, was
8 liable "to the same extent as Summit" for failure to pay the trust fund contributions. Id. In line with
9 the court's reasoning in Summit, the Court agrees that a general contractor and a subcontractor may
10 be sued concurrently.

11 Similarly, in Tobler v. Board of Trustees, the Supreme Court of Nevada held that employees
12 are not required to exhaust all possibilities of recovery from the subcontractor before pursuing the
13 general contractor. Tobler and Oliver Constr. Co. v. Board of Trustees of the Health and Insurance
14 Fund for Carpenters Local Union No. 971, 442 P.2d 904 (Nev. 1968). Tobler was a general
15 contractor for the construction of a micro-wave station, and White Concrete was the sub-contractor.
16 Id. at 905. White Concrete failed to carry out its sub-contract and also failed to pay all of its labor
17 bills. Id. Tobler paid off the balance of White Concrete's labor bills and its insurance premiums
18 owed. Id. Tobler did not however, pay the amount owed by White Concrete to the Union under the
19 terms of the collective bargaining agreement. Id. The Union then sued both Tobler and White
20 Concrete for the money owed. Id. Shortly after the suit commenced, the subcontractor confessed
21 judgment in the amount prayed for in the complaint. Id. Summary judgment was moved for against
22 the general contractor, which was granted. Id. On appeal, the Supreme Court of Nevada upheld the
23 summary judgment. Id. at 906. Tobler made the same argument Pulte Home makes in the present
24 case by contending that the Plaintiffs were obligated to exhaust all possibilities of recovery against
25 the subcontractor before they could avail themselves of the benefits of N.R.S. 608.150 to recover
26 from Tobler. Id. at 905. The Supreme Court did not agree with Tobler, stating that Tobler "cites no

1 authority to support its position, nor does the wording of N.R.S. 608.150 lend any support to its
2 contention.” Id. at 905. Here, the Court finds the reasoning of the Tobler court applicable and
3 persuasive in the present case. Plaintiffs need not exhaust all possibilities of recovery from
4 Employer Defendants before they may avail themselves of the benefits of N.R.S. 608.150 to recover
5 from Pulte Home.

6 The Supreme Court of Nevada in U.S. Design, clarified N.R.S. 608.150. It held that N.R.S.
7 608.150(3) grants employees of a subcontractor a private right of action against the general
8 contractor. U.S. Design & Constr. v. I.B.E.W. Local 357, 50 P.3d 170 (Nev. 2002). U.S. Design
9 was a general contractor that entered into a subcontract with Horizon to do the electrical work for a
10 store in the Forum Shops at Caesar’s Palace. Id. at 171. Horizon thereafter declared bankruptcy and
11 failed to pay its employees benefits that had been deducted from their paychecks. Id. The Nevada
12 District Court granted a motion for summary judgment against U.S. Design. Id. On appeal, U.S.
13 Design argued that only district attorneys may enforce the provisions of N.R.S. 608.150, and that the
14 statute did not grant a private right of action to the Union or the Trustees. Id. at 172. Upon
15 examination of the statute’s legislative history, the Supreme Court of Nevada made it clear that
16 N.R.S. 608.150 intended to give workers a right to bring actions against general contractors for
17 unpaid wages stating, “the legislature’s intent to permit workers to have a private right of action is
18 readily apparent [under N.R.S. 608.150].” Id. at 172.

19 Moreover, the statute language does not expressly include a two-part condition which must
20 be satisfied prior to the original contractor’s liability. Defendant Pulte Home is asking the Court to
21 interpret N.R.S. 608.150 to include two procedural requirements that were not included in the
22 statute’s language by the Nevada Legislature. The language “*may be owing* or have accrued” does
23 not require a plaintiff to attain a court determination prior to bringing an action against an original
24 contractor. N.R.S. 608.150(3) (emphasis added). A plaintiff may sue an original contractor for
25 wages that “may be owing.” This does not suggest, as Pulte Home would have the Court believe,
26 that the amount owing must be fully adjudged. Pulte Home argues that the language “*failure of any*

1 *subcontractor*,” signifies the subcontractor’s absolute inability to pay. The Court disagrees. The
2 “failure of any subcontractor” refers to the subcontractor’s actual failure to pay wages, and not its
3 ability to pay them.

4 An examination of the legislative history of N.R.S. 608.150 supports this finding. In 1932,
5 the Nevada Commissioner of Labor expressed a desire for a change in Nevada’s labor and
6 employment laws that greatly influenced the enactment of the statute which later became N.R.S.
7 608.150. See 1929-1930 Nev. Comm’r Labor Biennial Rep. 7, reprinted in 1 Appendix to Journals
8 S. & Assemb., 35th Sess. (Nev. 1931). The Commissioner stated, “I believe amendments should be
9 adopted to our present laws or new legislation passed making the subcontractor an employee of the
10 general contractor and the general contractor held responsible for the payment of wages . . .” Id.
11 Pulte Home contends that the Commissioner’s statement essentially meant that if the subcontractor
12 unlawfully evaded liability for unpaid wages, then employees could collect from the original
13 contractor. However, as stated above, the Supreme Court of Nevada has held that the reports from
14 the Commissioner of Labor indicate a desire to expand the options available to workers for
15 recovering unpaid wages, and not to narrow those options. U.S. Design & Constr. v. I.B.E.W.
16 Local 357, 50 P.3d 170, 172-173 (Nev. 2002).

17 In light of the Nevada case law, the plain language of the statute, and the legislative history,
18 the Court finds that Defendant Pulte Home is properly included in the current action. Plaintiffs need
19 not obtain a court finding against the subcontractor in order to proceed against the original
20 contractor. The Court further finds that N.R.S. 608.150 was intended to expand workers’ options to
21 recover unpaid wages. It would be inappropriate to limit a plaintiff’s recovery from an original
22 contractor only to instances where the subcontractor is absolutely unable to pay. As held in Summit,
23 this Court agrees that the original contractor, Pulte Home, may be held liable to the same extent as
24 the subcontractors. Trustees v. Summit, 309 F.Supp.2d 1228 (D. Nev. 2004).

25 The Court notes that Pulte Home’s potential liability is limited, however, to the amount of
26 unpaid overtime wages which Plaintiffs incurred while working on Pulte Home projects. Plaintiffs

1 have established that Pulte Home was a general contractor for Employer Defendants, however, the
2 Court agrees with Pulte Home that Plaintiffs have not yet established that Employer Defendants may
3 owe Plaintiffs additional wages as a result of overtime work on a Pulte Home project. Plaintiffs
4 necessarily bear this burden of proof. The scope of the current motion is limited to the grounds that
5 it is procedurally improper to include Pulte Home. The Court finds that it is procedurally proper for
6 Pulte Home to be included in the present action. Therefore, Pulte Home's Motion to Dismiss is
7 hereby denied.

8 **III. CONCLUSION**

9 Accordingly, **IT IS HEREBY ORDERED** that Defendant Pulte Home's Motion to Dismiss
10 (#30) is **DENIED**.

11 DATED this 27th day of July 2007.

12
13 

14 _____
15 Kent J. Dawson
16 United States District Judge
17
18
19
20
21
22
23
24
25
26